MOHD ZIN ABDULLAH

v.

AZNIZAL RAJARI

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: 12-23-97]
12 DECEMBER 2000

CIVIL PROCEDURE: *Action - Dismissal of action - Dismissal based on oddity of filing claim before police report - Whether proper - Whether appellate court should interfere*

ROAD TRAFFIC: *Evidence - Conflicting versions by plaintiff and defendant - Degree of probability of conflicting versions*

DAMAGES: *Quantum - Closed fracture midshaft right femur with shortening - Fracture of patella - Permanent decreased vision in right eye - Decreased hearing in right ear - Head injury*

The plaintiff brought a claim for damages for injuries suffered as a result of an accident with the defendant's vehicle. The plaintiff's claim was filed before the plaintiff had made a police report on the accident.

The trial court found the circumstances suspicious and dismissed the plaintiff's claim without considering the evidence adduced.

As a result of the accident the plaintiff had suffered the following injuries: (i) closed fracture midshaft right femur with shortening: (ii) fracture of patella; (iii) permanent decreased vision in right eye; (iv) decreased hearing in right ear; and (v) head injury comprising fracture of the right frontal intracerebral haemorrhage with old bifrontal contusion with cerebral atrophy.

The plaintiff appealed against the dismissal of his claim.

Held:

[1] There is no statutory requirement that there must be a police report filed first before a case is filed in court. There was nothing in the judgment of the trial court to show that the said court had sieved through the oral testimony of the parties and the neutral evidence before reaching a decision. In the circumstances the trial court had misdirected itself when it dismissed the plaintiff's claim.

[2] The total effect of the evidence adduced was that the plaintiff's story was more probable than that suggested by the defendant. As the defendant had not alleged contributory negligence on the part of the plaintiff, the defendant was 100 per cent liable for the accident.

[3] The plaintiff was awarded the sum of RM43,000 for the leg injuries, RM40,000 for the eye injury and RM35,000 for the head injuries.

[Appeal allowed with costs.]

Case(s) referred to:

Dawson v. Murex Ltd [1942] 1 All ER 483 ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113 ***(foll)***

Wong Thim Yit v. Mohamed Ali [1971] 2 MLJ 175 ***(refd)***

Yew You & Anor v. Mah Poay Koh & Anor [1970] 1 MLJ 57 ***(refd)***

For the plaintiff/appellant - Brijnandan Singh Bhar; M/s Brijnandan Singh Bhar & Co

For the defendant/respondent - Kenneth George William; M/s SN Fam & Co

Reported by Satish PS Nair

JUDGMENT

Suriyadi Halim Omar J:

On 1 June 1997 the Sessions Court judge dismissed the appellant's 'runners' case with costs. Being dissatisfied with that decision he filed this appeal. The facts of the action revealed that, on 29 April 1996 the appellant while riding his motorcycle en route towards the direction of Jeli, and coming from the direction of Tanah Merah, had collided with the respondent defendant. The appellant alleged that at the scene of the accident, he saw the respondent who was exiting from the left side of a supplementary road, entering the main road and then negotiating a U-turn purposefully to turn towards the direction of Tanah Merah. Due to the suddenness of the defendant's maneuver, exacerbated by the short distance separating them, a collision occurred. As a result of the impact the plaintiff fainted. About four months later ie, on 17 August 1996, the appellant reported the incident to the police, as per P3. His excuse for the delay in filing that report was that, he was mentally weak and was 'unable to think' then. Only after having stabilised was it filed.

This late reporting took centre stage in the case as prior to the filing of P3, on 18 June 1996, a claim had already been filed by the appellant against the respondent. The Sessions Court took exception to this oddity and thenceforth dismissed the claim. His ground of dismissal on the issue of liability was confined to thus:

Semasa soal semula oleh peguamnya, Plaintif mengesahkan dia mengarah saman difailkan berdasarkan dokmen yang ada iaitu laporan polis dan rajah kasar. Jika dirujuk kepada saman dan penyata tuntutan ianya difailkan di Mahkamah pada 18 Jun 1996. Jadi persoalan timbul kepada Mahkamah, apakah laporan polis yang ada. Laporan polis Plaintif P3 dibuat pada 17 Ogos 1996. Lagi pun Plaintif sendiri mengatakan bila dia boleh berfikir baru dia pergi buat laporan polis.

Timbul satu keraguan yang amat jelas dan nyata kepada Mahkamah berkaitan dengan penyataan tuntutan Plaintif. Sudah tentu ia difailkan bukan dari arahan Plaintif sendiri kerana Plaintif hanya boleh berfikir semula pada lebih kurang pada masa laporan polis dibuat, dua bulan selepas penyataan tuntutan difailkan. Juga timbul keraguan kepada Mahkamah samada laporan polis Plaintif P3 dibuat oleh Plaintif sendiri atau dibuat berdasarkan atau dibuat dengan merujuk kepada atau "in accordance" dengan Penyataan Tuntutan. Yang pastinya Penyataan Tuntutan tidak mungkin dibuat berdasarkan laporan polis Plaintif. Bagaimana fakta-fakta tentang kemalangan dan butir-butir kecuaian pihak Defendan boleh dinyatakan dengan jelas di dalam Penyataan Tuntutan padahal laporan polis dibuat kemudian daripada itu. Juga Plaintif hanya boleh berfikir pada masa laporan polis dibuat. Jadi arahan-arahan tentang fakta-fakta kemalangan dan butir-butir kecuaian Defendan datang daripada siapa. Berdasarkan keraguan 'suspicion' tersebut, Mahkamah menolak keterangan Plaintif dan Penyata Tuntutan Plaintif sepenuhnya dengan kos.

The interpreted version of the above three paragraphs is as follows:

When re-examined by his counsel, Plaintiff confirmed that he had instructed the summons to be filed based on the available documents namely the police report and the sketch plan. The Summons and the Statement of Claim were filed in Court on 18th June 1996. Thus the question that cropped up in Court was, which police report did the Plaintiff mean, when he said that he had instructed the summons be filed based on the police report then supposedly available. The Plaintiff's police report was only filed on 17th August 1996. Furthermore, the Plaintiff himself had said that it was only after he was able to think that the report was filed.

How could the facts of the accident and the particulars of negligence be clearly stated in the Statement of Claim, when the police report was actually made after that? Also, the Plaintiff could only think at the time when the police report was made. So where did the instructions about the facts of the accident and the particulars of negligence of the Defendant come from? Thus, **based on the said suspicion**, the Court hereby **dismisses the whole evidence of the Plaintiff and the Statement of Claim** with costs.

It was my finding that at no time did the presiding judge consider the evidence adduced by the appellant or the respondent, but merely had the case dismissed on the above said oddity. To dismiss the case merely on "suspicion', primarily on the ground that the summons and statement of claim of the plaintiff were

filed before the plaintiff lodged his police report, and before he could totally recall the events, certainly went against all known legal principles. The similarity of the police report with the particulars of the earlier filed statement of claim, met the wrath of the judge as he unreservedly cast negative aspersions on it. On the other hand there was absolutely no cogent evidence produced by the respondent to show that the police report was inaccurate, or was tailor-made to synchronize with the contents of the statement of claim. Only unsubstantiated derogatory remarks were made. One must bear in mind that, from another point of view, the fact that they were similar merely enhanced the consistency of the appellant's version. Certainly there is no statutory requirement that there must be a police report filed first before a case is filed in court. To place too much emphasis on a police report, which is not an encyclopedia of the events of the incident, but merely at best a corroborative piece of evidence would be a misdirection of sorts. Perhaps due to this red-herring, the court totally failed to decide whether the plaintiff's story was probable or whether the defendant was the negligent party then (*Wong Thim Yit v. Mohamed Ali* [1971] 2 MLJ 175; *Dawson v. Murex Ltd* [1942] 1 All ER 483; *Yew You & Anor v. Mah Poay Koh & Anor* [1970] 1 MLJ 57). Nothing was indicated in the above 'non-talking judgment' to show that the court had sieved the oral testimony of parties and the neutral evidence. That being so, the presiding judge had misdirected himself when he decided in that fashion, thus entitling me to interfere and to decide accordingly (*Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn. Bhd* [1993] 1 MLJ 113).

The evidence of the respondent was that he was driving his car from the direction of Jeli, going towards the direction of Tanah Merah, when he was collided into from the rear by the appellant. He made no mention of the alleged U-turn maneuver. In fact he totally denied that he was negotiating a U-turn. Interestingly enough too, the respondent never challenged the allegation of the investigating officer (SP1) that an admission was made by him, in that at the time of the accident, he was in the process of negotiating that turn. I have to assume that by that failure to cross-examine on this important factor the respondent had acquiesced to that piece of evidence. The respondent further testified, among others, that his trunk, bumper, rear right side of the car and right rear lights were damaged and had shattered respectively. The investigating officer (SP1), certainly an uninterested party, on the other hand evinced that the rear portion, including the bumper of the car was undamaged. He, on the other hand, confirmed that the right side of the bumper, rear right side of the mudguard, right side of the boot and the right rear lights were damaged and shattered, respectively. SP1's total evidence would certainly discount any suggestion that the respondent was traveling straight ahead towards Tanah Merah. This set of facts on its own would *prima facie* point to the fact that at the time of the impact, the respondent was certainly in front of the appellant but positioned at an angle.

A perusal of the sketch plan (RR 103) revealed several salient facts, which assisted the court in making its mind, particularly on the pertinent issue of whether the respondent had traveled in a straight line with the appellant, towards the direction of Tanah Merah. To reiterate, the appellant alleged that he was traveling from Tanah Merah and not towards it as alleged by the respondent. The sketch plan showed the respondent's car being parked on the side of the road, facing the oncoming traffic, which were coming from Tanah Merah. The appellant's motorcycle was also parked on the same side of the pavement. In the middle of the road were the broken dividing white lines. Pieces of broken glass were sketched near the dividing line but only strewn on the left side of the road as one faces Jeli. The questions that begged to be answered were, if both of the parties were en route to Tanah Merah, as alleged by the respondent:

1. why were the vehicles parked on the left side of the road as one faces Jeli; and

2. why were broken glasses strewn on the left side of the road as one faces Jeli, ie, the path of the appellant if his version were to be accepted?

The first question was posed as, if parties were going towards the direction of Tanah Merah, and it was necessary to park the damaged vehicles after the collision, surely the shortest distance to park the car would have been the left side of the road, as one faces Tanah Merah. As it were, they were parked at the extreme right end of the road as one faces Tanah Merah. The inference was that after the accident, the car had stalled closer to the side as one faces Jeli, hence adding more weight to the appellant's story, that the respondent had exited from the left side of the road as one faces Jeli. The second question was quite obvious in that if the collision had taken place, as per the version of the respondent in that he was traveling from Jeli to Tanah Merah, surely the broken glasses would have collected on his side of the road. If the impact were squarely on his rear bumper ie, if he were to be believed, the broken glasses would not have been flung to the other side of the road. They would have in all probability fallen *insitu* or had been scattered on the respondent's supposed right of way. The factor that finally demolished the latter's version was the evidence of a neutral policeman, who happened to pass by that place, before the vehicles were removed. In his effort to explain the original position of the car, he turned to the sketch plan, drawing it as facing Tanah Merah, but with the rear half encroaching onto the other side of the road. The drawing showed the vehicle positioned in a slanting manner. The picture seemed to support the appellant's story that the respondent had exited from a supplementary road, and when on the main road had thereafter attempted to maneuver a U-turn. It was at this stage that the collision occurred. The damages detected on the vehicle, located mainly on the rear right side of the

car, only confirmed the story that the car wanted to negotiate that turn. This policeman also sketched a tyre mark on the sketch plan, again on the right side of the road as one faces Jeli, ie, the path of the appellant as per his version. This was the very person who pushed the car to the side and surely the right person to verify the position of the vehicles at that juncture. The total effect of the evidence was that I found the appellant's story more probable than that suggested by the respondent. With the respondent not suggesting that the appellant did contribute to the accident, and as I was unable to detect any redeeming features on behalf of the former, it was my finding that the respondent was 100 per cent liable for the accident.

Pondering over the above overwhelming evidence that established the culpability of the respondent, as against the supposed 'suspicion', it was certainly regretful to come across a case where the presiding judge had portrayed a lackadaisical attitude in his work, either in the manner he meted his justice or the yardstick applied. Any failure by a judge from being vigorous in carrying out his sworn duty, of being diligent, dedicated and above all fair, would only bring to odium this highly respected institution of justice. Based on the available facts I allowed the appeal as regards liability. I now touch on the quantum.

Quantum Of Damages

The presiding Sessions Court judge after having scrutinised the evidence, decided that RM700 income per month was a reasonable sum for a rubber tapper. After taking into consideration the mitigating factors, he reduced that sum to RM350 per month. After multiplying it with 12 months and a multiplier of 16 years the loss of income was RM67,200.

For a close fracture of the mid shaft of the right femur together with its shortening effect, a sum of RM35,000 was suggested by him. For the fracture of the patella RM8,000 was proposed. After a very bizarre and ill-advised way of assessing the head injury, ie, by mere sight of the appellant in open court, and a consideration of part of the medical report, the court suggested an additional sum of RM30,000. The eventual global sum was RM73,000. The appellant during the appeal suggested a global sum of RM180,000 for the general damages. Not uncharacteristically the respondent remained passive and prayed that the court's original figures, either for the loss of income, or pain and suffering, be retained.

As said above, the Sessions Court judge had held that the plaintiff could earn as much as RM700 per month, but for some unfathomable reason had reduced it by half at the end of the day. The appellant had acquiesced before me to a reduced income of RM650 per month, and further suggested that it be

multiplied by twelve months, multiplied by the retained multiplier of 16 years. Having appreciated the sufferings of the appellant, particularly his impaired eyesight, shortening of his right leg, severe limp, head aches, loss of hearing and other cumulative afflictions, and bearing in mind that the availability of hired hands will be hard to come by, I had concluded that the sum of RM650 as his income per month, in the circumstances of the case as being very fair and reasonable. I therefore had ordered that the total sum for the loss of earnings be at RM124,800 (RM650 x 12 x 16).

As regards the general damages (for pain and suffering and loss of amenities), the appellant had acquiesced to the sum of RM43,000 for the leg injuries, as prompted by the Sessions Court judge. He parted company with the judge as regards the compensation of the eye and head injury. The appellant had suggested RM70,000 for the eye and another RM70,000 for the loss of hearing and other injuries. He globalised them at RM180,000. Having perused the medical report I agreed with the proposal of RM43,000 for the leg injuries. I now touch on the eye problem. Dato' Dr. C Bala Ratnam in his report stated the following:

> The right palpebrae fissure was narrower than the left and the right pupil was fixed and non-reactive to light and accommodation. Near and far vision was markedly compromised in the right eye. The right optic disc showed atrophy. (Vertical eye movements were restricted in the right eye).

The doctor's conclusion was that there was permanent decreased vision in the right eye. Having considered the pertinent authorities, I was satisfied that with the kind of eye injury the appellant had suffered, a reasonable compensation sum would be in the region of RM40,000.

For the head injury the same doctor's report read thus:

> **Investigations**
>
> 1. **X-ray**
>
> No evidence of any fractures. The skull vault is intact.
>
> 2. ...
>
> 3. **CT Scan of the brain**
>
> Encephalomalacia both frontal lobes; secondary to previous injury.
>
> In conclusion this man met with an alleged motor vehiele accident on 29 April 1996 resulting in:

1. **Coma with an initial Glasgow Coma of 12/15**

   Glasgow Coma Scale: 3 – 9 indicates severe brain damage
   0-12 indicates moderate brain damage
   13-15 indicates mild brain damage.

2. He has a bleeding per left ear.

3. ...

4. CT Scan of the brain showed a fracture of the right frontal intracerebral haemorrhage with old bifrontal contusion with cerebral atrophy.

A report from one Dato' Dr N. Arugusamy confirmed that the appellant's hearing was also decreased on the right. As regards the head injury a compensation sum of RM35,000 would not be off the mark. To globalize the compensation sum for the eye, head, and leg injuries a total sum of RM110,000 as compensation was fair and reasonable.

To wind up the matter, based on the above reasons, I allowed the appeal on both counts with costs, with the respondent being held liable at 100 per cent. As for the damages I ordered that the appellant be compensated RM124,800, on the basis of his earning of RM650 per month, multiplied by 12 months and multiplied by a multiplier of 16 years. As for the injuries the global sum was RM110,000.